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Supreme Court, U.S.
FILED

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**IN THE SUPREME COURT
OF THE UNITED STATES**

October Term, 1994

WILLIAM T. CONKLIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

William T. Conklin
Pro Se
3296 Raleigh St.
Denver, Colo 80212
(303) 455-0837

54 pp

QUESTIONS PRESENTED

I. Is Rule 38 of the Rules of Appellate Procedure unconstitutional because it denies a litigant due process and a right to be heard which is mandated by the Fifth Amendment?

II. Did the Court of Appeals err in determining that the petitioner could not raise the issue of due process in front of the District Court on remand?

III. Did the Court of Appeals err in sanctioning the petitioner under Rule 38, when he appealed an opinion from the District Court that took a position exactly opposite to that of the Supreme Court?

LIST OF PARTIES

The parties to the proceedings are the petitioner and the respondent.

The petitioner represented himself pro se.

The respondent was represented by Philip E. Blondin, Department of Justice Tax Division and William Pharo, United States Attorney in Denver, Colorado and on appeal by Kevin Brown, Jonathan S. Cohen and S. Robert Lyons, U. S. Department of Justice, Tax Division.

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II. The decision of the Tenth Circuit is in conflict with the decision of the Seventh Circuit in. **Brooks v. Allison Div. of Gen Motors Corp.**, 874 F.2d 489 (7th Cir).

III. Rule 38 is unconstituional as it denies due process to litigants and the decision of the Tenth Circuit denies due

process and is in direct conflict with the Supreme Court in **Chambers v. NASCO, Inc.** 1991, 111 St. Ct. 2123.

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Garner v. United States, 424 U. S. 648 (1975).

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United States v. Doe, 104 S. Ct. 1237 (1984).

Mc Knight v. General Motors Corp., 114 S. Ct. 1826 (1994).

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THE SUPREME COURT OF THE UNITED STATES

WILLIAM T. CONKLIN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, William T. Conklin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in the above entitled proceeding June 6, 1995.

OPINIONS BELOW The opinion of the Court of Appeals for the Tenth Circuit is unpublished and is reprinted in the appendix hereto.

The opinion of the United States District Court for the District of Colorado is set forth in the Appendix hereto.

JURISDICTION

Jurisdiction of the United States District Court for the District of Colorado is Title 28 Section 1346(a)(1).

On petitioner's appeal to the United States Court of Appeals, the Court denied the appeal on the issues on June 6, 1995. The jurisdiction of the court of Appeals to hear the case was invoked under 28 U.S.C. 1291.

The jurisdiction of this court to review the judgment of the Tenth Circuit

is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Section 6702. Frivolous Return

Statue provides as follows:

(a) Civil penalty.

If--

(1) Any individual files what purports to be a return of the tax imposed by subtitle A but which--

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicates that the self-assessment is substantially incorrect; and

(2) the conduct referred to in paragraph (1) is due to--(A) A position which is frivolous, or

(B) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws, then such individual shall pay a penalty of $500.00.

ARTICLE V: UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;

nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; **nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;** nor shall private property be taken for public use without just compensation. (emphasis, mine)

RULE 38 OF RULES OF APPELLATE PROCEDURE

If a court of appeals shall determine that an appeal is frivolous, it may, award just damages and single or double costs to the appellee.

STATEMENT OF THE CASE

William T. Conklin, the appellant in this action, hereinafter referred to as "Conklin" was classified as an illegal tax protester by the IRS for his involvement in the Church of World Peace. His case was set aside for special scrutiny by the Internal Revenue Service Criminal Investigation Division. There can be no question that he was confronted with substantial and real hazards of incrimination by virtue of the Criminal

Investigation's Interest in his case. He became concerned about waiving his Fifth Amendment Rights on a 1040 return after speaking with several attorneys who advised him that he does waive his Fifth Amendment Rights when he signs a return.

So, Conklin, in an attempt to comply with the law and not voluntarily waive his Fifth Amendment Rights, filed a return with payment and the necessary assessment information. He did not sign the return but instead he provided a power of attorney form giving the IRS power of attorney to sign the return if they could do so without waiving his Fifth Amendment Rights.

The IRS assessed Conklin a $500 penalty for filing a frivolous return, Conklin paid the fine and filed a claim for a refund. The IRS denied the claim and Conklin filed suit in 1989.

The lower Court ruled May 2, 1994 that the IRS imposition of the penalty was justified and the Tenth Circuit affirmed the opinion on September 10, 1994 and sanctioned Conklin with attorney's fees and double costs. The Tenth Circuit sent the case back to the District Court for its recommendations and the District Court ruled on January 13, 1995 that Conklin should be sanctioned approximately $6,000 plus double costs. The District Court told Conklin that due process does not apply. Conklin appealed and on June 6, 1995; the 10th Circuit Court of Appeals ruled that Conklin could not contest the fairness of the sanction at the remand to District Court.

REASONS FOR GRANTING THE WRIT

The court ruled that: **"Plaintiff misunderstands the nature of the fifth Amendment Privilege. It protects against compelled testimonial communications."** (emphasis mine) Conklin is a pro se and he naturally has assumed in the past that the testimony on a tax return is a "compelled testimonial communication" in view of the fact that the IRS continually indicts individuals for willful failure to file tax returns under 26 USC 7203. Since the general public believes that information on a tax return is "compelled" and since the Supreme Court has ruled in **Garner v. United States,** 424 U.S. 648 (1975) that information on a tax return is compelled testimony for the purposes of the Fifth Amendment, it is not unreasonable for a layman to conclude

that giving information to the government on a tax return is compelled and that it is testimonial.

The **Garner Court** stated:

...The Government compels the filing of a return much as it compels, for example, the appearance of a "witness" before a grand jury. (p. 652).

The **Garner Court** went on to say:

...The information revealed in the preparation and filing of an income tax return is, for purposes of Fifth Amendment analysis, the testimony of a "witness." (p. 656).

The court has taken the position that Conklin's position is frivolous because testimony on a tax return is **NOT** compelled. The Supreme Court in Garner ruled that testimony on a tax return is compelled and that it is Fifth Amendment testimony.

The court sanctioned Conklin with attorney's fees and double costs even though he relied on counsel. In

sanctioning Conklin, the Court held Conklin to the standards of an attorney in direct violation of the law in **Haines v. Kerner,** 404 U.S 519 (30 L.Ed 2d, 1972).

Furthermore, the lower courts ruled that Conklin had taken a blanket Fifth Amendment even though he completed a tax return and provided copies of his tax records to the IRS. In the case of United States v. Doe, 104 S. Ct., 1237 (1984), that an individual waives his Fifth Amendment Rights if he admits to having records. Since Conklin admitted to having records and since he completed his tax return and sent it to the IRS lacking only a signature, he could not have taken a blanket Fifth Amendment.

In view of the fact that the Supreme Court has ruled in Garner, supra that information on a tax return is "compelled

testimony," and the District Court for the District of Colorado and the Tenth Circuit have ruled that information on a tax return is not "compelled testimony." And in view of the fact that the lower courts have held Conklin to the standards of an attorney in sanctioning him, and in view of the fact that the Court has taken the position that an individual takes a blanket Fifth Amendment simply by withholding a signature in contradiction of Doe, supra, this Court should correct the refusal of the Court of Appeals to consider Supreme Court cases.

The District Court and the Court of Appeals denied any sort of due process to Conklin and sanctioned him on an issue of first impression in spite of the fact that the lower court ruled directly opposite the Supreme Court. Such a position violates the Supreme

Court law in **Chambers v. NASCO, Inc.** 1991, 111 S. Ct. 2123 and **McKnight v. General Motors Corp.**, 114 S. Ct. 1826 (1994). It also takes a position opposite that taken by the Seventh Circuit Court of Appeals in **Brooks v. Allison Div. of Gen. Motors Corp.**, 874 F.2d 489 (7th Cir. 1989) since the government did nothing to mitigate the expenses. The Court of Appeals ruled that the petitioner could not raise the issue of due process in the District Court on remand. It is the petitioner's position that the issue of due process could not be raised until a final determination of the amount of sanctions had been made by the court. Since the Court of Appeals remanded the case to the District Court for its recommendations, the issue of sanctions was not arguable until the final determination as to the amount of

the sanction was made. Therefore, the instant appeal is the proper time to raise due process and fairness issues.

Rule 38 is unconstitutional because it allows the Circuit Court to sanction a litigant and does not allow any meaningful opportunity for the ligitant to contest the sanctions. Due process requires, that before sanctions are imposed, the offender be afforded fair notice and an opportunity to be heard. Conklin had no reasonable notice that he would be fined $6,000 and he had no reasonable opportunity to respond. Since Rule 38 does not mandate due process for the offending litigant, it is unconstitutional.

CONCLUSIONS

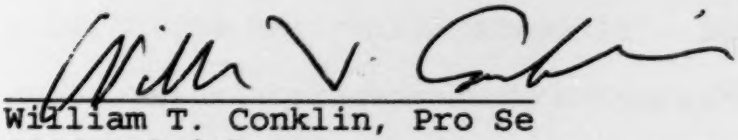
The issues raised here involve a substantial question of law about the

imposition of sanctions by the Circuit Court of Appeals when there has been no determination that the petitioner acted in bad faith and when the Circuit Court of appeals for the Tenth Circuit has failed to consider the law in **McKnight and Chambers, supra.** There is also a substantial question of law about whether Rule 38 is Constitutional when it allows the Court of Appeals to sanction an offending litigant without an opportunity to be heard. Furthermore, since the government did nothing to mitigate the damages, the decision of the Tenth Circuit is in direct conflict with the ruling in **Brooks v. Allison Div. of Gen Motors Corp., supra.**

Wherefore it is prayed that this honorable Court will grant the Petition for a Writ of Certiorari.

Respectfully submitted this the

_____th day of _____, 1995.



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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 95-1052

D.C. No. 89-N-1514)

(Dist. Colo).

William T. Conklin,

Plaintiff -- Appellant

v.

United States of America,

Defendant - Appellee

FILED

June 6, 1995

Patrict Fisher, Clerk

ORDER AND JUDGEMENT*

Before Moore, Barrett and Ebel, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

This is an appeal from an order awarding attorney fees as a sanction directed by this court following a prior appeal we determined was frivolous. **Conklin v. United States**, 1994 WL 504211, 36 F.3d 1105 (10th Cir. Unpublished), cert. denied, 115 S. Ct. 583 (1994). As we directed, the district court held a hearing and found attorney fees in the amount of $5,999.36 were reasonable. In the process, the court found the rate claimed by government counsel was not challenged and the time spent in first

determining the nature of Mr. Conklin's claims and then meeting them was reasonable.

On appeal, Mr. Conklin seeks to re-litigate the original order imposing sanctions. These matters have already been decided, and we will not rehear them.

Mr. Conklin contends the district court incorrectly determined the issues because it c lassified Conklin as a 'self-described tax protester. Whether that description is apt (the prior order and judgment imposing sanctions used a similar appellation) is irrelevant. The only factual issues involve whether the fees claimed by the government are reasonable. Mr. Conklin's relationship to the tax laws of the United States are not involved in that determination.

Mr. Conklin contends the district court erred by not reconsidering his arguments that the imposition of sanctions by this court was improper that matter, having been resolved by this court, was not before the district court.

The judgment of the district court is AFFIRMED and the mandate shall issue Forthwith.

Entered for the Court

S/ John Porfilio Moore

Circuit Judge

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action NO. 89 N 1415

WILLIAM T. CONKLIN,

Plaintiff,

UNITED STATES OF AMERICA,

Defendant

ORDER

This matter is before the court on Plaintiff's Motion for Reconsideration filed January 18, 1995, and supplement thereto. Upon consideration and review, the motion is denied. Plaintiff has had

fair notice and full consideration of all issues.

IT IS SO ORDERED

Dated this the 23rd day of January, 1995,

BY THE COURT:

S/ Edward W. Nottingham

United States District Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

Docket No. 94-1213

D.C. No. 89-N-1514

Dist of Colorado

WILLIAM T. CONKLIN,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ORDER
Entered October 11, 1994

Before LOGAN, McWILLIAMS and BARRETT, Circuit Judges.

This matter comes on for consideration of appellant's petition for

rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

Entered for the court

PATRICK FISHER, Chief Deputy Clerk

By: s/ "Audrey F. Weigel"

Deputy Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

September 16, 1994

Docket No. 94-1213

D.C. No. 89-N-1514

Dist of Colorado

WILLIAM T. CONKLIN,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ORDER AND JUDGMENT

Before LOGAN, McWILLIAMS and BARRETT, Circuit Judges.

After examining the briefs and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. AP. 34(a) Tenth Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

William T. Conklin (Conklin), a self-described "known tax protester like Jesus Christ, Thomas Jefferson, Benjamin Franklin and George Washington, " (R., Vol. II. Tab 42 at 1), appeals from an Order and Memorandum of Decision dismissing his complaint and granting summary judgment in favor of the United States. (Internal Revenue Service (IRS).

In February or March, 1988, Conklin sent the IRS a Form 1040, individual income tax return. The return

was accompanied by several Form W-2s relating to wage income, a Form 5948 relating to retirement account information, and several Form 1099s relating to other income. The Form 1040 however, "was bereft of information except for a pre-printed label with plaintiff's name and address." (R., Vol II, Tab 42 at 2).

Several letters were submitted with the Form 1040. Within the letters, Conklin explained the lack of information on the Form 1040 by noting that he had previously given power of attorney to the IRS's district counsel to sign his returns "if they can be signed without waiving my constitutional rights." Id. at 3. Plaintiff also requested that the "IRS complete and sign his 1987 return." Id. Thereafter, the IRS notified Conklin that it could not accept the Form 1040

because it did not contain information required by law.

In response, Conklin mailed the IRS a second Form 1040 which contained wage data and a claim for the standard deduction. The form indicated that Conklin owed, and had previously paid, $200.00 in income taxes. Conklin however, did not sign the Form 1040. Rather he again referred to the power of attorney included with his 1986 return and implied that the IRS should sign the form for him.

Thereafter, the IRS assessed a $500 Penalty against Conklin pursuant to 26 U.S.C. Section 6702 for filing a frivolous tax return. Conklin promptly paid $75.00 of the penalty as allowed by 26 U.S.C. Section 6703(c) and demanded a refund. When the IRS refused to refund,

Conklin filed this action. Both parties moved for summary judgment.

In granting the IRS' motion for summary judgment, the court found: Conklin's argument that his refusal to sign his 1987 Form 1040 was proper on the grounds that his signature would violate his fifth Amendment Rights was rejected in Betz v. United States, 753 F.2d 834, 835 (10th Cir. 1985) ("It is well settled that the Fifth Amendment general objection (to filing a proper tax return) is not a valid claim of the constitutional privilege."); Conklin's contention that his classification by the IRS as an illegal tax protester justifies invocation of the Fifth Amendment privilege "misunderstands the nature of the ...privilege...which protects against compelled testimonial communications...(and) Plaintiff has

wholly failed to persuade me that truthful completion of the IRS Form 1040 or any related forms would tend to incriminate him." (R. Vo. II at p. 6).

On appeal, Conklin posits the following issues: "Whether an individual who has been classified as an illegal tax protester has a valid concern about waiving his fifth Amendment rights when he signs a federal income tax return;" "Whether an individual who has been advised by several attorneys that he will waive his Fifth Amendment Rights on a Federal Tax Return should be penalized when he relied in good faith on the advice of counsel." The government responds that the District Court correctly held that Conklin was liable for the $500.00 frivolous return penalty imposed under Section 6702. Further, the government urges that we should impose

sanctions against Conklin for bringing this frivolous appeal. We agree. We affirm for substantially the reasons set forth in the district court's Order and Memorandum of Decision dated May 2, 1994

Moreover, "(i)n light of plaintiff's legally frivolous arguments, the award of attorney's fees and double costs (are) justified." Betz, 753 F.2d at 835. See also: Charczuk v. Commissioner of Internal Revenue, 771 F.2d 471, 474-76 (10th Cir. 1985); Martinez v. Internal Revenue Service, 744 F.2d 71, 73 (10th Cir. 1984)

Accordingly, attorney fees and double costs are hereby imposed against Conklin for the taking of a legally frivolous appeal. The matter is REMANDED to the district Court to make the appropriate determinations.

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*This order and judgment is not binding precedent,

except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.RD. 470.

The mandate shall issue forthwith.

Entered for the Court:

James E. Barrett,
Senior United States

Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 89 N 1514

WILLIAM T. CONKLIN,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant

Filed

United States District Court

Denver, Colorado

May 02, 1994

James R. Manspeaker, Clerk

ORDER AND MEMORANDUM OF DECISION

Plaintiff William T. Conklin is "known tax protester like Jesus Christ, Thomas Jefferson, Benjamin Franklin and George

Washington," to use the self- description contained in "Plaintiff's Motion in Opposition to Govt's (sic) Motion for Summary Judgment" (filed Dec. 11,1989). He filed this action to get a refund of the $75.00 he paid towards a $500 penalty assessed by the Internal Revenue Service for filing a frivolous income tax return. His basic position appears to be two-fold. First, he claims, he did not sign the return because he was advised that he could not do so without waiving his rights under the Fifth Amendment to the United States Constitution; rather, he gave the IRS a power of attorney to sign the return, if this could be accomplished without a waiver of such rights. See generally" complaint (Jury Trial Demanded)" (filed Sept.5. 1989). Second, since he "did not sign the return, (he) did not file it and cannot, therefore,

be penalized for filing" a frivolous return. United States'Mem in Supp. of the Renewed Mot.. for Summ. J., Ex. E. (letter from plaintiff to IRS dated Aug. August 9, 1989)(filed Oct. 2, 1990) He also claims that numerous procedural gaffes on the part of the IRS preclude imposition of the penalty.

The Government filed a motion to dismiss or for summary judgment on December 12, 1989. Plaintiff, with alacrity responded to the motion on December 11, 1989, according to the court clerk's filing stamp. By an Order filed May 9, 1990, I denied the Government's motion for failure to comply with Fed. R. Civ. P. 56. The Government renewed its motion; again, I denied it because of new and different procedural inadequacies. See Order filed Jul 16, 1990). On August

31, 1990, and October 2, 1990 , the government tried again. In addition, plaintiff filed his own motion for summary judgment on August 9, 1990. These motions are now before the Court.

FACTS

In February or March of 1988 the exact date being the subject of a dispute, immaterial for present purposes, plaintiff sent the IRS a Form 1040 (U. S. Individual Income Tax Return). The return was accompanied by several standard forms reporting items of plaintiff's income--a Form W-2 (relating to wage income), a Form 5498 (relating to individual retirement account information), and two Form 1099's (relating to other sorts of income). The Form 1040 itself, however, was bereft of information on, except for a pre-printed label with plaintiff's name and address. United States Mem. in Supp.

of the Renewed Mot for Summ J., Ex. A (filed Oct 2, 1990) (hereinafter simply called "Government's Mot.")

Plaintiff has sworn, and the Government does not dispute, that certain letters were submitted with the Form 1040. Second Decl. of William T. Conklin par 8, attached to Pl.'s Resp. to Def's Mot for Summ. J. (filed Oct. 10, 1990). In one letter plaintiff explained the lack of information the From 1040 by noting that he had previously "given District Counsel power of attorney to sign my returns for me if they can be signed without waiving my constitutional rights." Id., Attach, A-1 (letter IRS from plaintiff dated Jan 29, 1988). The apparent reference is to IRS Form 2848 (Power of Attorney) which plaintiff delivered to the IRS with his 1986 return and which covered '1986 and subsequent years." government's Mot., Ex. E. (letter to IRS from plaintiff dated Aug. 9, 1989, with numerous

attachments, one of which is power of attorney.) Plaintiff therefore requested that the IRS complete and sign his 1987 return. Thoughtfully, he sent the return "in plenty of time so that you can get it filed by the April 5, 1988 deadline."

The IRS was unamused. On August 19, 1988, it notified plaintiff that it could not accept the Form 1040 because it did not contain information required by law. Reciprocating plaintiff's thoughtfulness, it "enclosed two blank income tax return forms and an addressed envelope for your convenience in filing a proper return." Government's Mot. Ex. B.

Plaintiff responded to the IRS requires on August 22, 1988. This time, he supplied a Form 1040 which

provided identifying information, contained wage data gleaned from the W-2's and 1099's, claimed the standard deduction, and indicated that he owed (and had previously paid) $200 in income taxes. Still, he refused to sign the form, referring instead to the power of attorney and implying that the IRS should sign the form for him.

The IRS remained unimpressed. On August 7, 1989, it wrote:

> Your statement that you are not furnishing information needed to determine your income tax liability based on your constitutional rights is a frivolous position You have been charged a penalty of $500 for filing a document purporting to be an income tax return which contains frivolous (without merit in tax law) arguments to reduce taxes or delay the collection of taxes.

Government's Mot. Ex. D. Plaintiff promptly paid 15% of the penalty ($75) and demanded a refund. Government Mot.

Ex. E. When the IRS refused, he filed this lawsuit.

DISCUSSION

Section 6702 (a) of the Internal Revenue Code provides If--

(1) any individual files what **purports to be a return** of the tax imposed by subtitle About which -

(A) does not contain information on which the substantial correctness of the self-assessment may be judged,
...and

(2) the conduct referred to in paragraph (1) is due to--

(A) a position which is frivolous, or
(B) **a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws, then such individual shall pay a penalty of $500.00.** 26 U.S.C.A. 6702 (West 1989) (emphasis supplied)

The legislative history of this statute indicates that Congress was concerned about the lack of a penalty provision for protest tax returns the situation where, through withholding or otherwise the taxpayer paid the correct amount of tax . See Senate Rep. 97-494 reprinted in 1982 U.S. Cong and Admin News 1023-25. Congress was troubled

about the growth in deliberate defiance by tax protesters and advisors who frequently emphasize the lack of any penalty when sufficient tax has been withheld from wages and encourage others to play the "audit lottery." The committee believes that an immediately assessable penalty on the filing of protest returns will help deter the filing of such returns, and will demonstrate the determination of the Congress to maintain the integrity of the income tax system.

1982 U.S. Code Cong. and Admin. News at 1024.

With this general background in mind, I turn to plaintiff's specific contentions. He first asserts that his refusal to sign his 1987 Form 1040 is proper on the ground that his signature would amount to a waiver of his Fifth Amendment rights. This is not the law. **Betz v. United States,** 753 F.2d 834 (10th Cir. 1985). In **Betz,** the Tenth Circuit affirmed a district court's granting of summary judgment in favor of

the Government where a taxpayer sought a refund of the "frivolous return" penalty in 26 U.S.C.A. Section 6702 (West 1989), assessed against him after he filed a return without providing any information on which tax liability could be computed. Plaintiff's argument in **Betz,** like Conklin's argument in this case, was a general Fifth Amendment objection to the tax return. According to the Tenth circuit, it is "well-settled that the Fifth Amendment general objection is not valid claim of constitutional privilege." Betz, 753 F.2d at 835. Not only did the Tenth Circuit affirm summary judgment, but the court went on to award attorney fees and double costs against the plaintiff for filing a legally frivolous appeal. "(This Court has imposed sanctions where this broad fifth Amendment privilege has been asserted."

Id. Although Conklin did provide enough information to calculate his taxes (unlike Betz, who provided no information), another court has found that the deliberate failure to sign a return constitutes furnishing legally insufficient information under the frivolous return penalty provision. In Schneider v. United States, 594 F. Supp 611 (E.d. Mich. 1984), the failure to sign a tax return, even though the return was accurate in all other respects, was held to warrant the imposition of the $500 penalty for a frivolous tax return.

Plaintiff argues that his classification by the IRS as an illegal tax protester justifies invocation of his fifth amendment privilege. This classification, he claims, is a clear signal that he is "confronted by substantial and real, and not merely

trifling or imaginary, hazards of incrimination." Marchetti v. United States, 390 U.S. 39, 53, 88 S. Ct. 697 705 91968) Plaintiff misunderstands the nature of the fifth amendment privilege. It protects against compelled testimonial communications. See United States v. Argomaniz, 925 F.2d 1349, 1352 (11th Cir. 1991), quoting Fisher v. United States, 425 U.S. 391, 409, 96 S. Ct. 1569, 1580 (1976). Plaintiff has wholly failed to persuade me that truthful completion of the IRS Form 1040 or any related forms would tend to incriminate him.

Plaintiff's argument that there were no OMB numbers on the assessment forms, Compl. par 18, is factually incorrect, and his later argument that OMB numbers were incorrect is legally irrelevant, as is challenge

to the assessment procedure. His argument that he was not mailed a copy of the assessment within sixty days is undercut by the fact that he attached a copy of the notice he alleges he never received as Exhibit 9 to the Complaint. See United States' Resp. to Pl. Mot. for an Order Def erring Consideration of the United States' Mot. for Summ. J. at 2. I have also reviewed all of plaintiff's other arguments. I do not believe that case law supports those arguments. Accordingly, it is ORDERED as follows:

1. The Government's motions for summary judgment filed August 31, 1990 and October 2, 1990 are GRANTED.
2. Plaintiff's motion for summary judgment filed August 9, 1990 is DENIED.
3. All other motions are denied

as moot.

Dated this the 2nd day of MAY, 1994

By the Court:

S/ "Edward W. Nottingham"

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 89 N 1514

WILLIAM T. CONKLIN,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant

Filed

United States District Court

Denver, Colorado

May 02, 1994

James R. Manspeaker, Clerk

JUDGMENT

Pursuant to and in accordance with the Order and Memorandum of Decision signed May 2, 1994 by the Honorable Edward W.

Nottingham, United States District Judge, and incorporated herein by reference as if fully set forth, it is ORDERED that judgment is hereby entered in favor of the defendant United States of America and against the plaintiff William T. Conklin. It is

FURTHER ORDERED that this action and complaint are hereby dismissed with prejudice, each party to bear their own costs.

DATED at Denver, Colorado this 2nd day of May, 1994.

Entered on the Docket May 2, 1994

For the Court:

JAMES R. MANSPEAKER, CLERK

By: S/ "Stephen P. Ehrlich,"

Chief Deputy Clerk

(2)

Supreme Court, U.S.
FILED
AUG 23 1995
CLERK

No. 94-2118

In the Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM T. CONKLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an award of attorney's fees for prosecuting a frivolous appeal was properly entered against petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15-18) is unpublished, but the decision is noted at 56 F.3d 77 (Table). The order of the district court was delivered orally from the bench at the conclusion of a hearing and is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1995 (Pet. App. 15). The petition for a writ of certiorari was filed on June 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Although petitioner filed an income tax return for 1987, he refused to sign it. He claimed that signing his return would waive his rights under the Fifth Amendment to the United States Constitution. The Internal Revenue Service assessed a $500 penalty against petitioner under Section 6702 of the Internal Revenue Code for filing a frivolous return. Petitioner paid $75 of the penalty and sued for a refund in district court. See 26 U.S.C. 6703(c) (1988 & Supp. V 1993).

The district court granted summary judgment to the United States. The court held that petitioner's blanket assertion of a Fifth Amendment privilege was a frivolous ground for not signing his return and justified imposition of a frivolous return penalty under Section 6702.

2. The court of appeals affirmed (Pet. App. 23-30) and also imposed attorney's fees and double costs as a sanction for petitioner's frivolous appeal (*id.* at 29). The court remanded the case to the district court "to make the appropriate determinations" as to the amount of counsel fees (*ibid.*). This Court denied the petition for a writ of certiorari that petitioner filed from the judgment of the court of appeals. 115 S. Ct. 583 (1994).

3. On remand, the district court awarded attorney's fees of $5,999.36 to the government. The court stated that "the rate claimed by government counsel was not challenged and the time spent in first determining the nature of [petitioner's] claims and then meeting them was reasonable" (Pet. App. 16-17).

4. The court of appeals affirmed (Pet. App. 15-22). The court noted that, under the order of remand from

the original appeal, the only issues properly before the district court were the reasonable time and reasonable charges for the work performed by government counsel. Since petitioner offered no evidence on either of those issues, the court of appeals upheld the district court's calculation of the proper award (*id.* at 16-18).

The court declined petitioner's invitation to reconsider the appropriateness of an award of fees for the prior frivolous appeal. The court noted that "[t]hese matters have already been decided, and we will not rehear them" (*id.* at 17).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. This Court denied the petition for a writ of certiorari from the order directing the award of attorney's fees for petitioner's frivolous appeal. 115 S. Ct. 583 (1994). On remand from that order, the district court properly determined that the reasonable attorney's fees for the frivolous appeal was $5,999.36. Petitioner offered no evidence to support any different award. The court of appeals therefore correctly affirmed the award.

2. Relying on *Brooks* v. *Allison Div. of General Motors Corp.*, 874 F.2d 489, 490 (7th Cir. 1989), petitioner contends (Pet. 11) that the award of attorney's fees was inappropriate in this case because the government failed to mitigate its damages. That contention is incorrect.

In *Brooks*, the district court awarded summary judgment to the defendant because the statute of

limitations barred the plaintiff's claim. The plaintiff appealed but failed to specify any particular error in the decision below. Instead of filing a motion to dismiss the appeal as frivolous, the appellee filed a brief on the merits. The Seventh Circuit stated that, by failing to file a motion to dismiss the appeal as frivolous, appellee had failed to mitigate the burdens that the frivolous pleading imposed upon it. 874 F.2d at 490.

In the present case, however, Rule 27.2.1 of the Rules of the Tenth Circuit provides that a motion to dismiss may be filed "only on the ground that the appeal is not within the jurisdiction of this court." The government was therefore required to file an answering brief in response to petitioner's appeal. The award of fees in this context was appropriate.

3. Petitioner seeks to renew his contention that it was error to award fees as a sanction for his original frivolous appeal. His arguments, although not entirely clear, appear to be that: (i) he was denied due process when, on remand to the district court, he was not allowed to challenge the order that sanctions be entered; (ii) an award of fees for a frivolous appeal is inappropriate in this case because his Fifth Amendment objection to signing his income tax return presented a question of first impression; and (iii) the award of fees was inappropriate because he is a *pro se* litigant and reasonably relied upon the law as he understood it. None of these claims has merit.

(i) Petitioner received due process in challenging the sanctions entered against him by participating in the appeal from which the order of sanctions was entered and by petitioning this Court for a writ of certiorari from that order. Petitioner received due process in challenging the calculation of the fee

award by appearing in the district court to contest the award, by appealing that award to the court of appeals and by petitioning from the affirmance of that order to this Court. No further or other process is due.

(ii) The Fifth Amendment claim that petitioner asserts does not present a question of first impression. As the court of appeals noted at the time that it entered the award of fees as a sanction for petitioner's frivolous appeal, "[i]t is well settled that the Fifth Amendment general objection (to filing a proper tax return) is not a valid claim of the constititutional privilege" (Pet. App. 27, quoting *Betz* v. *United States*, 753 F.2d 834, 835 (10th Cir. 1985)). See also *Eicher* v. *United States*, 774 F.2d 27 (1st Cir. 1985); *Baskin* v. *United States*, 738 F.2d 975 (8th Cir. 1984); *Steinbrecher* v. *Commissioner*, 712 F.2d 195 (5th Cir. 1983).

Aside from the fact that petitioner's case obviously does *not* present a question of first impression, petitioner errs in contending that attorney's fees may not be awarded in a case that presents a *frivolous* question of first impression. The cases on which petitioner relies (Pet. 11) do not support that proposition. In *McKnight* v. *General Motors Corp.*, 114 S. Ct. 1826 (1994), the Court vacated sanctions against petitioner when the appeal was filed to preserve an issue that the Supreme Court had not then decided where the answer "was not so clear as to make petitioner's position frivolous." *Ibid.* And, in *Chambers* v. *NASCO, Inc.*, 501 U.S. 32 (1991), which petitioner cites without explanation, the Court upheld an award of attorney's fees for bad faith in the conduct of litigation. *Id.* at 55. The decision of the court of

appeals in this case does not conflict with either of those decisions.

(iii) Petitioner appears to rely (Pet. 8-9) on *Haines* v. *Kerner*, 404 U.S. 519 (1972), for the proposition that it was error to award fees against him because he is a *pro se* litigant. In *Haines*, the Court found that certain "inartfully pleaded" allegations of a *pro se* litigant were sufficient to withstand a motion to dismiss. *Id.* at 520. In this case, by contrast, petitioner's allegations were clear; but they were also clearly frivolous. *

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* Petitioner has a lengthy history of litigation in the courts below. See, *e.g.*, *Conklin* v. *United States*, No. 95-1013 (10th Cir. July 31, 1995); *Church of World Peace* v. *Commissioner*, 52 F.3d 337 (10th Cir. 1995) (Table); *Conklin* v. *United States*, 36 F.3d 1105 (10th Cir.) (Table), cert. denied, 115 S. Ct. 583 (1994); *Pleasant* v. *Lovell*, 974 F.2d 1222 (10th Cir. 1992); *Conklin* v. *Commissioner*, 897 F.2d 1027 (10th Cir. 1990); *United States* v. *Church of World Peace*, 878 F.2d 1281 (10th Cir. 1989); *Conklin* v. *United States*, 812 F.2d 1318 (10th Cir. 1987); *United States* v. *Church of World Peace*, 775 F.2d 265 (10th Cir. 1985); *Conklin* v. *Commissioner*, 54 T.C.M. (CCH) 173 (1987); *Church of World Peace, Inc.* v. *United States*, 86-1 U.S.T.C. ¶ 9375 (D. Colo. 1986); *Conklin* v. United States, 85-2 U.S.T.C. ¶ 9534 (D. Colo. 1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1995